COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCICDENTS **BOARD NO.: 021735-04**

Employee: Janice Litchfield
Employer: Nesco Resource
Insurer: Zurich North America

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Costigan)

APPEARANCES

Charles Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Richard J. Florino, Jr., Esq., for the insurer

FABRICANT, J. Where the administrative judge did not credit the employee's claim that her knee gave out due to the effects of her industrial injury, causing a fall and further injuries, and where the impartial physician's opinion was that the employee's knee disability, although temporarily aggravated by the injury, was no longer related to her work injury, denial of further benefits was not error, as the employee argues on appeal. We therefore affirm the decision, with one minor modification.

In a September 2001 motor vehicle accident, the employee sustained an injury to her right knee which resolved within a few months. Subsequently, on July 13, 2004, the employee fell at work, landing on her knees. The employee underwent orthopedic treatment and physical therapy, and over time her left knee recovered, but her right knee remained painful. Following arthroscopic surgery on May 5, 2005, the employee attempted to return to work in August 2005, but claimed she could not perform her job duties, due to continuing right knee instability. She left work after two weeks, and was terminated shortly thereafter. (Dec. 719; Tr. 15.)

On her own initiative, the employee enrolled in a computer course in January 2006. She alleges that while attending class on January 18, 2006, her right knee "gave out," causing her to fall and suffer a concussion, along with other injuries.

The insurer accepted liability for the 2004 work injury, but filed a request for modification or discontinuance of compensation in 2005. The employee countered with a claim for further payments of § 34 temporary total incapacity benefits. Following a § 10A conference, a different administrative judge assigned the employee a $250 earning capacity and ordered payment of § 35 partial incapacity benefits. Only the insurer appealed that order. (Dec. 718)

On February 21, 2006, an impartial medical examination was conducted by Dr. Richard N. Warnock, who diagnosed the employee's condition as pre-existing chondromalacia of the right patella, which might have been temporarily aggravated by her work injury, but which was remedied by her arthroscopy in May 2005. The doctor opined that the employee's work injury did not result in any permanent loss of function, that her knee was not unstable, and that her permanent partial disability was attributable to her pre-existing condition, not the work injury. (Dec. 720-721.)

The judge adopted the impartial physician's opinion that the employee had no knee instability and thus did not credit the employee's claim that her knee had given out in January 2006. The judge based his finding, in part, on contemporaneous medical records which described the January 18, 2006 episode as a trip and fall. He also found that this incident severed the causal link between her knee impairment and the work injury, and that her ongoing impairment was due to her pre-existing chondromalacia and not related to her work injury. The employee's claim for compensation benefits as of January 18, 2006 was denied. (Dec. 721-722.)

The employee argues on appeal that the judge's decision was arbitrary and capricious either because the January 18, 2006 injury at the computer class did not sever the causal connection, or, in the alternative, because it was work-related as she was injured attempting to retrain herself. However, we need not address either of these arguments, given the exclusive impartial medical opinion that the employee's disability was causally related only to her pre-existing chondromalacia, and not her July 13, 2004 work injury. We note the judge's finding that the employee's knee did not "give out" on January 18, 2006 is consistent with the adopted impartial physician's opinion that the examination of the employee uncovered no knee instability. The judge's termination of benefits was

correct, and we therefore affirm the decision. See McCambly v. M.B.T.A., 21 Mass. Workers' Comp. Rep.57, 61 (2007)(decision affirmed, even if correct for wrong reason). [1]

One final point favors the employee, albeit in a modest way. The insurer sought discontinuance of benefits only as of the date of the impartial examination, February 21, 2006. (Dec. 717.) The judge ordered discontinuance as of January 18, 2006. The insurer is not entitled to relief sooner than it claims. Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354 (1995). We therefore modify the judge's decision so as to terminate the employee's benefits as of the later date, and order the insurer to pay the employee those several weeks of retroactive § 35 benefits, pursuant to the December 19, 2005 conference order. (Dec. 718.)

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **August 27, 2008**

[1] The employee's argument that the judge's denial of additional medical evidence due to the "gap" between her work injury and the examination is moot, as the employee did not appeal the conference order of modification, and the insurer's appeal only disputed causally related disability from and after February 21, 2006. (Dec. 717.)